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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1972

No. 72-6104

JOSE GONZALEZ,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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PETITION NOT PRINTED

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Preliminary Statement

Petitioner in the above-entitled case prays for a writ of certiorari to review an order of the Court of Appeals of the State of New York, entered November 30, 1972 [31 N.Y.2d 787], unanimously affirming, with memorandum opinion, an order of the Supreme Court of the State of New York, Appellate Division, First Department, entered March 14, 1972 [38 A.D.2d 912]. This, in turn, affirmed with no majority opinion, but with concurring and dissenting opinions, a judgment of the Supreme Court of the State of New York, Bronx County, rendered April 19, 1971, con-

victing petitioner, after a jury trial, of the crimes of Criminal Possession of a Dangerous Drug in the First Degree [New York Penal Law §220.23] and Criminal Possession of a Dangerous Drug in the Third Degree [id., §220], and sentencing him to a term of twenty years to life in State Prison for the former offense along with a concurrent indeterminate term of five years imprisonment for the latter charge.

Petitioner is presently incarcerated pursuant to this conviction.

Opinions Below

A. Opinion of the Court of Appeals [31 N.Y.2d 787 (1972)]

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. JOSE GONZALEZ, Appellant.

Order affirmed in the following memorandum: Contrary to the argument advanced by the People, it is of absolutely no consequence that appellant, absent from his apartment when the search was made, failed to claim a proprietary interest in the premises at the hearing on his motion to suppress. Charged with possessory crimes, standing was conferred on him on the simple showing that the People sought to use the contraband evidence against him (*Jones* v. *United States*, 362 U. S. 257; People v. Smith, 35 Misc 2d 533, 535-536). However, although we conclude that appellant obviously had standing, we find no reversible error in the admission of the evidence against him and it may not be said that appellant's Fourth and Fourteenth Amendment rights have been impaired.

Concur: Chief Judge FULD and Judges BURKE, SCILEPPI, BERGAN, BREITEL, JASEN and GIBSON.

B. Opinion of the Appellate Division
[38 A.D. 2d 912 (1st Dept. 1971)]

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. JOSE GONZALEZ, Appellant.—Judgment, Supreme Court, Bronx County rendered on April 19, 1971 affirmed. Concur—McGivern, J. P., Markewich, and Kupferman, JJ; Kupferman, J., concurs in a memorandum and Nunez and Murphy, JJ., dissent in a memorandum by Murphy, J., as follows:

KUPFERMAN, J. (concurring): The judgment should be affirmed. As Justice Steuer aptly stated in *People* v. *Sullivan* (37 AD 2d 559, 562 [dissent], app. dsmd. 29 N Y 2d 937): "It is most discouraging to witness the release of a wholesale dealer in the drug poisoning a large sector of the community upon what is, at best, a hypertechnical view of the law and, at worst, what we believe a mistaken view of the defendant's rights. The safeguards of our system unfortunately make it difficult to apprehend and convict one who like this defendant, occupies a place in the drug traffic a step away from the ultimate consumer. While he is entitled to the protection of those safeguards, there appears to be no good reason why they should be extended by interpretation far beyond their salutary purposes for his benefit."

MURPHY, J. (dissenting): On October 28, 1970, the defendant was arrested for loitering. He was held a short time and then released. This was two weeks after an unnamed informer pointed out the defendant to officer Jones as being a dealer in narcotics. By coincidence the officer spoke to the informer who told him the defendant had been arrested and that it would be 'the best time to go over to his (defendant's) house." Officer Jones went over and was able to purchase heroin from the defendant's girl friend, Rios, who was in

the apartment. He then arrested the girl and took her to the bedroom where he also arrested a Luis Moran. He now handcuffed them together and took them to the front door and let his two fellow officers into the apartment. Rios and Moran were then taken back to the bedroom, sat on the bed and the police searched the apartment while waiting for defendant to arrive. Heroin and $543 were taken from the top of the dresser in the bedroom and milk powder from underneath the kitchen table and a suitcase containing heroin cutting paraphernalia from a closet. When the defendant arrived, 45 minutes later, he was arrested for possession of the heroin in the apartment. He was searched and heroin found on his person. Defendant then allegedly stated that everything found in the search of the apartment belonged to him. After a hearing the motion to suppress the statements and the tangible evidence was denied; and after trial the defendant was convicted of criminal possession of a dangerous drug in the first degree and sentenced to 20 years to life, and of criminal possession in the third degree and sentenced to a concurrent indeterminate term of five years. The search without a warrant was improper. Under these facts a search may be made at the time of arrest only to protect the officer's safety and to protect evidence which might otherwise be destroyed. In *Chimel* v. *California* (395 U.S. 752, 763), the court stated: "it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grap a weapon or evidentiary items

must, of course, be governed by a like rule. A gun on a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested. There is ample justification, therefore, for a search of the arrestee's person and the area 'within his immediate control'—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence." When arresting Rios and Moran the officer did not search and seize what was in their immediate control, but handcuffed them and took them to the front door. At this point they were in custody and removed from the immediate area under their control at arrest and accordingly a warrant was required to search the apartment. The search conducted was to obtain evidence, not to protect the evidence from being destroyed; and, consequently, violated the Fourth Amendment. The fact that Rios and Moran were in the apartment does not change the result as far as this defendant is concerned. As was held in *Alderman* v. *United States* (394 U.S. 165, 176-177): "If the police make an unwarranted search of a house and seize tangible property belonging to third parties * * * the homeowner may object to its use against him, not because he has any interest in the seized items as 'effects' protected by the Fourth Amendment, but because they were the fruits of an unauthorized search of his house, which is itself expressly protected by the Fourth Amendment. Nothing seen or found on the premises may legally form the basis of an arrest or search warrant or for testimony at the homeowner's trial, since the prosecution would be using the fruits of a Fourth Amendment violation." The "plain view" doctrine does not apply here since there was no exigency requiring an immediate warrantless search. (*Coolidge* v. *New Hampshire*, —— U.S. ——.) The time for the search ended with both

occupants of the apartment handcuffed at the front door. The arrest of this defendant, then, was the product of an illegal search of the defendant's apartment. (*Vale* v. *Louisiana*, 399 U.S. 30; *Wong Sun* v. *United States*, 371 U.S. 471.) Since there is no probable cause then for the arrest of the defendant without the illegally obtained evidence, the physical evidence and the admissions which are subject to the same rules, should have been suppressed. It follows that the search of the defendant's person was also tainted for that was not pursuant to a lawful arrest. The suitcase in the closet and the milk powder under the kitchen table were not in "plain view" nor are they admissible by any standards, and the admissibility of these items alone requires a new trial. It cannot be "harmless error" for it could have weighed heavily in the jury's determination. The court in its charge pointed out that since the heroin was found not on his person but in his apartment, that they would have to determine if "he knowingly and lawfully possess[ed] it." The court went on to charge that the paraphernalia "may be evidence tending to prove or disprove guilt, or innocence" and that they could disbelieve the officer's testimony as to the defendant's admissions; and if they did disbelieve the admissions they could determine his guilt or innocence of possession "based solely upon the inferences which arise from this defendant's tenancy and occupancy of the apartment." Since the jury could have arrived at its verdict two ways, and one way is clearly incorrect and there is no way of knowing how they came to their decision, the verdict must be set aside. The jury could have disbelieved the admission that it all belonged to him and found that all the paraphernalia indicated the defendant had the narcotics in the apartment. Without the paraphernalia and the milk sugar, on the other hand, there is not enough in the record to convict him in the absence of the admis-

sion. I do not find it necessary to consider defendant's contentions that he was "set up" for this arrest or that the sentence was excessive since, as stated, the search was illegal. Accordingly, I would reverse and dismiss the indictment. At the very least, the defendant would be entitled to a new trial on the alternate theories of possession that were charged.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3). The order of the New York Court of Appeals was entered November 30, 1972. The order of the Supreme Court of the State of New York, Appellate Division, First Department, was entered March 14, 1972.

Questions Presented

In our view, no substantial federal questions have been presented in this case. Nevertheless, we shall list the claims that petitioner has set forth:

1. When petitioner is the intended target of a search, can evidence against the petitioner be constitutionally obtained under the Fourth and Fourteenth Amendments to the United States Constitution from a warrantless search of petitioner's apartment when such warrantless search was permissible (if at all) solely on the basis of actions by the occupants of the apartment during petitioner's absence?

2. Does a search of an apartment after the occupants have been taken into custody and handcuffed constitute an illegal search and seizure under the Fourth and Fourteenth Amendments of the United States Constitution?

3. Did the search and seizure of items found in a closed closet and under a kitchen table constitute an illegal search and seizure under the United States Constitution, and if so, can admission of such findings into evidence be held harmless beyond a reasonable doubt?

4. Was evidence obtained against the petitioner the result of petitioner's unlawful arrest for loitering and was the introduction of such evidence at trial therefore inadmissible under the Fourth and Fourteenth Amendments to the United States Constitution?

5. Did petitioner's alleged admissions constitute the fruits of an unlawful search and seizure?

Statement of the Case

In the early part of October, 1970, an unnamed, unregistered informant pointed out Jose Gonzalez, petitioner herein, to Patrolman James A. Jones of the New York City Police Department and identified him as "* * * a guy that's doing heavy dealings in the neighborhood" (H 5-6).* The "heavy dealings" referred to the narcotics traffic, and the informant was intimately acquainted therewith, having worked for petitioner, so he said, packaging heroin (H 6-7).

Approximately two weeks after this, Jones again encountered this same informant while he was on patrol with two other officers, like himself, assigned to plainclothes duty. The informant alluded to their previous meeting

* References denoted "H" and "T" refer respectively to the stenographic Minutes of Hearings, held January 26-27, 1971, and Trial, March 2-4, 1971.

and told Jones that Gonzalez had been arrested although he did not know why. He urged Jones to go to petitioner's apartment before he returned, since only defendant's girlfriend would be there (H 8, 30).

The three officers took this advice. Upon arriving at the premises, a basement apartment located at 1664 Grand Avenue, the Bronx, Patrolman DePaolis guarded the rear entrance and Sergeant Markman remained in front in the car, while Jones went in and knocked on the door (H 9, T 78, 98).

Jones heard a woman's voice ask who it was. The officer responded that Jose had sent him. The woman, Antonia Rios, then opened the door and admitted Jones into the kitchen of the apartment, which consisted of two rooms: the one in which he stood and a living room into which he could see, and where he observed white powder on a dresser (H 10, T 29a-32, 63, 79, 98).

Jones offered to purchase heroin from Rios. She, in turn, brought a man, Luis Moran, in from the other room, and he approved the sale. Next, the woman accompanied Moran into the other room and returned alone to the kitchen with fifteen glassine envelopes which she sold to Jones for $25.00 (H 10-11).

Following this, Jones identified himself and placed Miss Rios under arrest. He then took her to the living room where he arrested Moran, who was seated on the bed, at a dresser, filling a glassine envelope with a white powder (H 11).

Jones handcuffed his prisoners and summoned DePaolis who in turn summoned Markman. Sitting on the dresser, in open view, were nine bags containing white powder which ultimately proved to hold almost twenty-eight ounces of heroin as well as $543.00 in cash (H 11-12, T 79, 98, 124).

Although he had no warrant, Jones then searched the apartment. In a closet, he found a suitcase full of heroin-cutting paraphernalia. He also found two bags of white milk sugar under the kitchen table (H 12, 46-7, T 79-80, 99).

Although Officer Jones originally went to the apartment in the simple hope of purchasing heroin from petitioner's girlfriend, that intention was altered when he saw the large quantity of heroin in the premises and when he heard Rios declaim that Gonzalez would soon return. In view of these developments, the officers decided to wait for up to an hour (H 35-6).

The three police officers and their two prisoners, who were handcuffed, waited in the living room for petitioner to return. They turned on the television so as not to arouse suspicion. About forty-five minutes later, there came a knock at the door. Jones and Markman went to the door and heard a key turn the lock, whereupon Jones pulled the door open and saw Gonzalez, flanked by two others, standing outside, returning a key to his pocket (H 15-6, 80, 100).

Gonzalez was arrested and searched. In his hand was a paper bag full of empty glassine envelopes, and in his

pants pocket was a plastic bag containing more than three and one-half ounces of heroin (H 16, T 80, 101, 129).

Jones had advised petitioner of his rights directly upon arresting him, but Gonzalez at first declined to say anything. However, some fifteen minutes later, he changed his mind and asked to speak with Jones, whereupon he, Jones and Markman repaired to the kitchen where Jones again advised petitioner of his rights. Petitioner orally waived those rights and admitted to Jones: "Everything in the apartment belongs to me. It doesn't belong to anyone else" (H 54-55, T 81).

Finally, sometime later at the precinct, while Gonzalez was confined in a cell with all the narcotics on a table within his view, he again stated to Jones and Markman: "Listen, I thought you was going to let these people go. I told you everything is mine" (T 38, 81).

The defense case at trial consisted of a single witness, Luis Rivera, the petitioner's addicted brother-in-law, and one of the two persons arrested with defendant at the door of his apartment. He said that he and Gonzalez had been together several days. At about 11:00 A.M. the morning of October 28, 1970, he had had a shot, but denied ever being drowsy after injecting narcotics. At about 2:00-2:30 P.M. that day, he was with defendant and another, when they decided to go to Gonzalez's apartment and change clothes. He described their arrival, arrest and search. But he claimed he never saw Gonzalez with a key, and controverted the testimony that Gonzalez had made admissions. He did admit that he saw narcotics in the

apartment, but said he did not see the other paraphenalia (T 159-73).

When both sides had rested, after due deliberation, the jury found petitioner guilty as charged. He was sentenced, as outlined above, on April 19, 1971. His conviction was affirmed by the Appellate Division with two judges dissenting, and again by a unanimous New York Court of Appeals.

Following this last appeal, petitioner moved in the New York Court of Appeals to reargue and to amend the remittitur. Both of these motions were denied in an order dated December 6, 1972.

POINT ONE

The police conduct with respect to the seizure of the heroin and the currency, and defendant's arrest was proper and not violative of defendant's rights under the Fourth and Fourteenth Amendments to the United States Constitution.

Petitioner contends that all the items seized in his apartment by the police were the fruits of an illegal search, which the police cunningly contrived to conduct by having petitioner removed from the scene via the stratagem of a pretextual arrest, a proposition for which there is no support on this record.

However, we have dichotomized the seizure into two parts: first, the seizure of the heroin and currency; and second, the seizure of the milk sugar and paraphernalia.

The former, we contend, was legally seized inasmuch as it was in open view which the police had legitimately obtained. And as to the latter, noncontraband items, our position has been that even if improperly seized, their introduction into evidence was, at worse, harmless error.

We note also with respect to these noncontraband items that we maintained below that the petitioner lacked standing to contest the search herein, since he was concededly not on the premises while they were searched, and later failed to claim any proprietary interest therein [see, *Mancusi* v. *DeForte,* 392 U.S. 364 (1968); *Bumper* v. *North Carolina,* 391 U.S. 543 (1968); *Simmons* v. *United States,* 390 U.S. 377 (1968); *Jones* v. *United States,* 362 U.S. 257 (1960); *United States* v. *Sacco,* 436 F.2d 780 (2nd Cir., 1971); *United States* v. *Shea,* 436 F.2d 740 (9th Cir., 1970); *United States* v. *Nasse,* 432 F.2d 1293 (7th Cir., 1970); *United States* v. *Gregg,* 403 F.2d 222 (6th Cir., 1968)]. However, the New York Court of Appeals rejected this argument, citing *Jones* v. *United States, supra.*

Be that as it may, the record in this case makes it abundantly clear that the police originally went to petitioner's apartment for the purpose of attempting to purchase narcotics from Antonia Rios (H 32-3). Acting logically on the tip they had received, since they had no basis on which to apply for a search warrant, the police officers successfully employed an entirely legitimate police technique, namely, the undercover purchase of narcotics.

It is undisputed, moreover, that Officer Jones was invited on the premises by Antonia Rios, and that his entry into the apartment was with her consent. It is equally un-

disputed that the arrests of Rios and Moran for the sale of narcotics were lawful. Furthermore, we maintain that the record shows that the heroin and cash on the bedroom dresser of this two-room apartment were in plain view (H 11-12, T 29a-32) and that Jones saw it from the other room, the kitchen, almost as soon as he entered the apartment (T 63).

Entirely *dehors* the record, however, is the subject of defendant's alleged arrest for loitering earlier in the day which defendant claims constituted an illegal pretext to obtain evidence against him. This allegation we find is not borne out by the record, notwithstanding the apparent fact that he actually was arrested earlier. The testimony of defendant's own witness, Rivera, in fact contradicts the claim of an earlier, pretextual arrest since he speaks of having been with defendant all during that day, but makes no mention of any arrest (T 162-3). To the contrary, the record is clear that the decision to wait for Gonzalez was made only after the discovery of the large quantity of heroin and after being assured by the girlfriend of the petitioner's imminent return (H 35-6). We therefore submit that any issue dependent upon this alleged detention has not been preserved for appellate consideration and that the proper mode of review remains to be pursued in the state courts, i.e., a motion to vacate judgment, formerly the writ of error *coram nobis* [New York CPL §440.10].

Finally, there is no dispute in this case that the search of defendant's person and the seizure of contraband from his pocket were properly incident to his arrest, or that his admissions were voluntary and were preceded by adequate

advisements of his constitutional rights. The threshold question therefore, is whether the arrest of defendant was tainted by an illegal search of his apartment and seizure of items therein. We submit that it was not and that the seizure of heroin and currency was entirely legal.

First of all, given Officer Jones' legal entry into the apartment by invitation, the conclusion is irresistible that the heroin and currency were legally seized since they were in open view. The record unequivocally indicates that, contrary to petitioner's contention, the police officer had seen the glassine envelopes and the money on the dresser from the time he entered the apartment to the moment he arrested Rios and Moran in the bedroom (H 11, 35-6; T 29a-32, 63).

It has long been the rule that objects falling within the open view of an officer who has properly obtained that view are subject to seizure and are admissible in evidence. In fact, under such circumstances, the officer is not engaged in a search at all [*Harris* v. *United States,* 390 U.S. 234, 236 (1968); *Ker* v. *California,* 374 U.S. 23 (1936); *People* v. *Galmon,* 19 N.Y.2d 389 (1967); see also, *United States* v. *Welch,* 466 F.2d 220 (10th Cir., 1971); *United States* v. *Thweatt,* 433 F.2d 1226 (D.C. Cir., 1970)].

In response to petitioner's allegation that the facts in this case do not fit within the rule established in *Chimel* v. *California* [395 U.S. 752 (1969)], we note that the original entry into the apartment was by invitation in order to conduct a narcotics transaction, and that petitioner nowhere takes umbrage with this mode of entry. Moreover, we point out that the officers, aware that petitioner might imminently

return, had just cause to fear the possible destruction of the evidence. Furthermore, the situation at bar clearly falls within the purview of this Court's discussion of the interplay between *Chimel* and the "plain view" doctrine, recently enunciated in *Coolidge* v. *New Hampshire* [403 U.S. 443, 467 (1971)]:

> "Where * * * the arresting officer inadvertently comes within plain view of a piece of evidence, not concealed, although outside of the area under the immediate control of the arrestee, the officer may seize it, as long as the plain view was obtained in the course of an appropriately limited search of the arrestee."

Petitioner argues further, as did the dissenters in the Appellate Division, that the arrest had been completed prior to the time when the contraband was seized. However, contrary to this proposition we assert that no rule has ever required a police officer to seize items discovered incident to arrest prior to the arrest. Rather, the only logical and proper police procedure is to secure the apprehension of the arrestees prior to seizure. Moreover, the record in the case at bar shows that, rather than completing the arrest in the living room where Officer Jones had taken them in order to call for assistance from his brother officers, the arrest was in fact completed in the bedroom where the occupants were placed upon arrest. So long as the course of events is one, continuous flow of action, as it was in the instant case, the seizure is considered incident to a valid arrest and therefore legal [*Cooper* v. *California*, 386 U.S. 58 (1966); *Gialcone* v. *Lucas*, 445 F.2d 1238 (6th Cir., 1971)].

Finally, it is clear in the case at bar that petitioner's admissions were in no way tainted by an illegal search.

Defendant was twice advised of his rights, whereupon he unequivocally admitted ownership of everything on the premises (H 55, T 38).

Thus, in light of the evidence adduced below, it is clear that the seizure of the heroin and currency was legal because it was in plain view and because it was seized incident to a valid arrest. There is therefore, no issue whatsoever respecting these items, *i.e.*, the heroin and currency, for review by this Court.

POINT TWO

The admission of the items seized in the closet and under the kitchen table was harmless error, presenting no substantial issue for review by this tribunal.

Petitioner has contended throughout that the search of the closet and under the kitchen table was violative of the Fourth Amendment and that the introduction at trial of the paraphernalia and milk sugar constituted reversible error. We have conceded throughout the appellate course of this case, that the police exceeded their permissible scope in the search which revealed these items. However, we have maintained, and the state courts have approbated our contention, that in light of the fact that the items so introduced were not contraband and therefore carried with them no criminal liability, and in view of the overwhelming evidence of guilt, the introduction of these items constituted mere harmless error.

We note at the outset, that no criminal liability could then have attached from the possession of either the her-

oin-cutting paraphernalia or the milk sugar, even though the contrary would be true today [see, New York Penal Law §220.20]. It was of no consequence then that petitioner admitted owning these items, and it can not be said that his admissions were the product of the seizure of those items. Moreover, while it would have been preferable for the police to have obtained a search warrant, it is our position that the exigent circumstances, resulting from the belief that petitioner and others would arrive imminently, prevented their so doing. The fact that no warrant was obtained as to the milk sugar and the paraphernalia, however, did not impair any of petitioner's substantial rights, for, as noted above, no criminal liability accrued from the possession thereof.

Furthermore, in establishing the rule that a Federal Constitutional error is deemed harmless only if it is harmless beyond a reasonable doubt, the Court in *Chapman* v. *California* [386 U.S. 18 (1967)], was careful to point out,

> "* * * there may be some constitutional errors which in the setting of a particular case are so unimportant or insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring automatic reversal of the conviction." [386 U.S. 18, 22 (1967)].

It further noted that one of the chief criteria for determining if error is harmless is whether the "question of guilt or innocence is a close one."

It is clear from the record, as heretofore demonstrated, that the evidence in this case is so overwhelming that there can be no doubt at all as to the guilt of this petitioner. Even if, therefore, the milk sugar and the paraphernalia

were erroneously admitted into evidence, there could be no prejudice to petitioner. These items are merely cumulative with respect to facts already proven, and their absence in the People's case would have been trivial. Their introduction into evidence, even if erroneous, would therefore be harmless beyond a reasonable doubt. [*Harrington* v. *California*, 395 U.S. 250 (1969); *Chapman* v. *California*, 386 U.S. 18 (1969); *Fahy* v. *Connecticut*, 375 U.S. 85 (1963); *United States ex rel. DiRienzo* v. *Yeager*, 443 F. 2d 228 (3rd Cir., 1971); *United States* v. *Nasse*, 432 F. 2d 1293, 1303 (7th Cir., 1970); *United States* v. *Lape*, 413 F. 2d 816 (9th Cir., 1969); *People* v. *Mills*, 31 A.D. 2d 433 (4th Dept. 1969), aff'd 26 N.Y.2d 862 (1970); see, also, Note, *Harmless Constitutional Error: A Reappraisal*, 83 Harv. L.Rev. 814, 818-20 (1970)].

Moreover, with respect to the admissions, any error in admitting the milk sugar or paraphernalia into evidence is clearly cured by the thorough advisements of his rights which petitioner twice received. With the absence of criminal liability for possessing these items, their seizure, if erroneous, is manifestly attenuated from petitioner's admissions.

Finally, it is obvious that any case such as this where the error is conceded and the only issue is its prejudicial effect, is one in which any precedent created by appellate review is confined to the particular facts of the case. The impact of the decision will extend no further than to this individual petitioner. It is therefore not a case of sufficient magnitude to justify further review by this Court. Especially is this so where petitioner has already had two appellate reviews of his conviction in the state courts. We therefore urge that the petition for certiorari be denied.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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